(2)

Supreme Court, U.S.
FILED
SEP 2 1994
OFFICE OF THE CLERK

No. 94-40

In the Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH L. JACKSON, PETITIONER

v.

TERRY L. BRIGLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Petitioner asserts claims under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, and *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for injuries that allegedly occurred when military law enforcement officers, acting under the order of petitioner's commanding officer, accompanied him from a military base to his off-base residence, assisted civilian police in a warrant-authorized search of the residence, and later conducted their own warrant-authorized search of petitioner's on-base motor home. The question presented is whether petitioner's claims are barred by the doctrine of intramilitary immunity recognized in *Feres* v. *United States*, 340 U.S. 135 (1950), and later decisions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	4
Chappell v. *Wallace*, 462 U.S. 296 (1983)	4
Feres v. *United States*, 340 U.S. 135 (1950)	4
Lauer v. *United States*, 968 F.2d 1428 (1st Cir.), cert. denied, 113 S. Ct. 812 (1992)	8
Lutz v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991)	8
Rodrigue v. *United States*, 968 F.2d 1430 (1st Cir. 1992)	8
United States v. *Shearer*, 473 U.S. 52 (1985)	7
Wisniewski v. *United States*, 353 U.S. 901 (1957)	8

Statutes:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	4
28 U.S.C. 2671 *et seq.*	4
Military Claims Act, 10 U.S.C. 2731 *et seq.*	8
42 U.S.C. 1983	4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-40

KENNETH L. JACKSON, PETITIONER

v.

TERRY L. BRIGLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-1 to I-10) is reported at 17 F.3d 280. The order of the district court (Pet. App. IV-1 to IV-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1994. Pet. App. I-1. A petition for rehearing was denied on April 6, 1994. Pet App. II-1. The petition for a writ of certiorari was filed on July 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the time of the events that gave rise to this case, petitioner was a Lieutenant Colonel on active duty in the United States Air Force. He was assigned to the Ballistic Missile Office at Norton Air Force Base in Southern California, where he served as Chief of the Small ICBM Guidance and Control Division. In that position, he had access to classified and highly sensitive military information. Petitioner lived off-base in a house with a civilian, Kenneth Lovato, but also maintained a motor home on the base. Pet. App. I-4, III-1.

In late January, 1988, Lovato became the object of a criminal investigation by the local police. C.A. E.R. 60. The investigation began when the police received information that Lovato had sexually molested two young boys in the house that he shared with petitioner, and that a third boy had watched a pornographic film in petitioner's bedroom. *Ibid.*; Pet. App. I-4, III-1. Lovato was arrested on February 1, 1988. C.A. E.R. 61. At the time of his arrest, he told the police that he had paid boys for sex and kept child pornography at the house. Pet. App. IV-1; C.A. E.R. 46. On February 3, 1988, the police obtained a warrant to search the house for "[a]ny photographs of young boys and girls in the nude, books, magazines showing [petitioner's] and Lovato's interest in sexual acts with children." C.A. E.R. 59.

The police advised the Air Force Office of Special Investigations (OSI) of the search warrant before they executed it. Pet. App. IV-1; C.A. E.R. 46.[1] In addition,

[1] The OSI is an "investigative/law enforcement" organization of active-duty service members who are "responsible by law for enforcing * * * the regulations of the United States Air Force and the laws of the United States." C.A. E.R. 12. As a matter of military policy, OSI agents cooperate with civilian law enforce-

they asked OSI to tell petitioner about the warrant, to accompany him to the house, and to witness the search. Pet. App. I-4; C.A. E.R. 46-47. Petitioner's commanding officer, Brigadier General Barry, also was advised of the warrant. The court of appeals later found that "[t]here was understandable concern about [petitioner's] possible involvement and the possible threat to security posed by the search." Pet. App. I-4. Barry ordered petitioner to accompany the OSI officers, and told him that the OSI agents would be present during the search "in the interests of the Air Force." C.A. E.R. 50.

Petitioner alleges that he was then arrested by the OSI agents and taken to his house, where they met the local police. Pet. App. IV-1; C.A. E.R. 25. While the house was being searched, petitioner told the police that he was a homosexual and had engaged in homosexual acts with Lovato. Pet. App. IV-2; C.A. E.R. 47. Petitioner alleges that the police gave that information to the OSI agents. See C.A. E.R. 16 (Compl. ¶ 16). During the search, the police found evidence confirming that petitioner had engaged in homosexual acts with Lovato. Pet. App. IV-2. Petitioner alleges that the OSI officers assisted the local police by searching his computer room for classified information. C.A. E.R. 17 (Compl. ¶ 18).[2] The OSI agents later searched petitioner's on-base

---

ment agencies investigating matters involving Air Force personnel or property. *Id.* at 46.

[2] Petitioner also alleges, more generally, that the OSI officers "assisted the local police in the search" and "seized items of property from [his] residence." C.A. E.R. 17 (Compl. ¶ 18). However, petitioner admits, and the district court found, that he did not observe the search, *id.* at 16 (Compl. ¶ 15); Pet. App. IV-1, and the OSI officers denied assisting in the search with the exception of looking for classified information in his computer room, C.A. E.R. 89-90 (Answer ¶ 18).

motor home under a warrant issued by the commanding officer of the base. Pet. App. IV-1; C.A. E.R. 65-69.

An ensuing Air Force investigation led to an administrative discharge proceeding against petitioner. Pet. App. IV-2. On September 27, 1989, petitioner was discharged under the regulations that mandate the discharge of servicemembers who engage in homosexual acts. *Ibid.*

2. In December, 1990, petitioner filed this action in the United States District Court for the Northern District of California. Petitioner asserted claims against four OSI agents under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* In support of those claims, petitioner alleged that the OSI agents had acted tortiously and unconstitutionally when they accompanied him to his residence, helped the civilian police search his house, and conducted their own search of his motor home. See Pet. App. IV-2 to IV-3; C.A. E.R. 20-24, 29-33.[3]

The government moved to dismiss petitioner's claims on the ground that they are barred by the doctrine of intramilitary immunity, which immunizes the government and its agents from *Bivens* and FTCA claims based on "injuries to servicemen * * * [that] arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950); see *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The district court denied the motion. It "fail[ed] to see any connection between

[3] Petitioner also asserted claims against unknown officials under 42 U.S.C. 1983. C.A. E.R. 24-29. Those claims were dismissed, and they are no longer at issue. See Pet. App. IV-3, IV-5.

[petitioner's] private, off-base, sexual activity and his military service." Pet. App. IV-9.

3. The government appealed the district court's order denying the motion to dismiss the *Bivens* claims against the OSI agents.[4] The court of appeals reversed, holding that petitioner's claims are barred by the *Feres* doctrine because his alleged injuries "are clearly 'incident to military service.'" Pet. App. I-9. The court based that holding on the fact that the OSI agents acted at all relevant times "under color of their authority as military law enforcement officers," and that "the agents were acting under color of General Barry's order." *Id.* at I-8.

ARGUMENT

1. Petitioner urges this Court to grant certiorari "in order to state clearly whether the *Feres* doctrine applies only to conduct incident to a *plaintiff's* military service, or simply to any person's military service." Pet. 11. The Court should decline to do so.

The issue of whether a distinction should be made between injuries incident to a *plaintiff's* military service and injuries incident to *any person's* military service is not the subject of a conflict among the lower federal courts. In addition, this case would not be an appropriate vehicle for review of that issue. The government argued below that petitioner's alleged injuries were "incident to military service." See, *e.g.*, Gov't C.A. Br. 12. In dealing with this question, both the district court and the court of appeals focused on

[4] The court of appeals observed, and the parties agreed, that its resolution of petitioner's *Bivens* claims against the OSI agents also controls his FTCA claims against the United States. Pet. App. I-10.

whether petitioner's injuries were incident to petitioner's own service. Pet. App. IV-8 (district court states that Supreme Court decisions barring recovery under *Feres* doctrine "all arose out of injuries inflicted *incident to the plaintiff's military service*"); *id.* at I-4 (critical inquiry under *Feres* is whether petitioner's alleged injuries were "incident to *his* military service") (emphasis added). Thus, this case does not present an appropriate occasion for review of the question whether the *Feres* doctrine applies only when the plaintiff's injuries are incident to the plaintiff's own military service.

The courts below correctly held, moreover, that petitioner's alleged injuries were incident to petitioner's military service. Petitioner was a senior active-duty officer whose "responsibilities required that he have access to classified and highly sensitive military information." Pet. App. I-4. In light of that position, the court of appeals correctly determined that, when OSI and Brigadier General Barry were told about the imminent search of petitioner's residence by civilian police, "[t]here was understandable concern about [petitioner's] possible involvement [in criminal activity] and the possible threat to security posed by the search." *Ibid.* Brigadier General Barry accordingly ordered petitioner to accompany the OSI agents to his house during the search and expressly explained that he was issuing that order "in the interests of the Air Force." See *ibid.*; C.A. E.R. 47, 50. The OSI agents, like petitioner, were acting in accordance with Barry's order when they attended the search in order "to insure that any United States Air Force property that might be located in the residence was protected." C.A. E.R. 47. The agents were also acting pursuant to their duties as military law enforcement officers. Under these circumstances, as the court

of appeals stated, "the injuries alleged by [petitioner] are clearly 'incident to military service.'" Pet. App. I-5.

Petitioner correctly observes (Pet. 5, 27) that, in its original opinion, the court of appeals mistakenly described Brigadier General Barry as the commanding officer of the base. Petitioner errs, however, in asserting (Pet. 27) that this mistake was "[c]entral" to the court of appeals' analysis. That assertion is belied by the fact that the court of appeals simply corrected the mistake in its published opinion without any other alterations. See 17 F.3d at 282. Moreover, it is undisputed that Barry was petitioner's commanding officer, and that petitioner was acting pursuant to Barry's order when he was allegedly arrested by the OSI agents and accompanied them to the search. Finally, there is no support for petitioner's contention (Pet. 29) that the OSI agents could not have been acting pursuant to Barry's orders because Barry was not in their direct line-of-command; in any event, that is precisely the sort of contention—which calls upon courts to review a military officer's authority to issue an order—that the *Feres* doctrine is designed to prevent courts from having to resolve. See *United States* v. *Shearer*, 473 U.S. 52, 58 (1985).

2. Petitioner invites this Court to recast the *Feres* doctrine into "a multi-part test, including as many bright-line rules as possible." Pet. 8. This Court has declined similar invitations, however, stating that the "*Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of * * * *Feres* and subsequent cases." *Shearer*, 473 U.S. at 57. Moreover, although petitioner claims (Pet. 13) that "[c]onfusion * * * abounds" among the courts of appeals regarding the *Feres* analysis, he does not contend, and cannot show, that his claims would have survived a motion to dismiss based on *Feres* grounds in any of the

other circuits.[5] Thus, even assuming there were a conflict among the circuits with regard to *Feres* analysis, this would not be an appropriate case in which to resolve the conflict.[6]

3. Finally, petitioner argues (Pet. 22-26) that the court of appeals erred in dismissing his suit without requiring the government to demonstrate the constitutionality of the regulations under which he was discharged. Those regulations, as noted above, provide for the discharge of servicemembers who engage in homosexual acts. See p. 4, *supra*. Petitioner's argument is without merit. As the court of appeals correctly stated in not reaching the constitutional issue (Pet. App. I-9):

---

[5] Petitioner suggests (Pet. 17-18) that his claims might have survived a motion to dismiss on *Feres* grounds in the First Circuit, but the decisions upon which he relies are inapposite. In *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430, cert. denied, 113 S. Ct. 812 (1992), the First Circuit held that the *Feres* doctrine *barred* a servicemember's FTCA suit against the government for injuries he sustained from a car that hit him when he was walking down a Navy-maintained road, returning to base from liberty. The other First Circuit decision upon which petitioner relies did not involve an application of the *Feres* doctrine; the First Circuit there held that it lacked jurisdiction to review a decision of the military rejecting a claim under the Military Claims Act, 10 U.S.C. 2731 *et seq.*, except for constitutional defects, which it did not find in the decision before it. *Rodrigue* v. *United States*, 968 F.2d 1430, 1432-1435 (1992).

[6] Petitioner contends (Pet. 18-21) that the Ninth Circuit's decision in this case conflicts with its prior decision in *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (1991). Any conflict within the Ninth Circuit, however, is for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, as the Ninth Circuit in this case explained, the decision below is consistent with *Lutz*. Pet. App. I-6 to I-7.

Whether *Feres* immunity exists does not turn on the constitutionality of a regulation or of a defendant's actions. The Supreme Court has repeatedly underscored this point by upholding the application of *Feres* to claims of constitutional harm. See [*United States* v. *Stanley*, 483 U.S. 669, 671-672 (1987)] (constitutional violation stemming from non-consensual administration of experimental drugs in military experiment); *Chappell* v. *Wallace*, 462 U.S. at 297 (racial discrimination by superior officers).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

SEPTEMBER 1994